

Order of Service; Directing Defendants to File Dispositive Motion or Notice Regarding Such Motion  
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1 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:  
2 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that  
3 the alleged violation was committed by a person acting under the color of state law. *See West v.*  
4 *Atkins*, 487 U.S. 42, 48 (1988).

5 B. Legal Claims

6 Plaintiff has filed a second amended complaint after the Court dismissed his original and  
7 first amended complaints with leave to amend for a variety of deficiencies. In his second  
8 amended complaint, Plaintiff alleges that he was improperly held in the Secured Housing Unit  
9 (“SHU”) from April 16, 2009 through November 5, 2009, even though he was found not guilty  
10 of a false rules violation report, or of any SHU-offense. Plaintiff alleges that he was denied his  
11 right to due process because he was not afforded procedural protections during the hearing, such  
12 as a right to call witnesses. Plaintiff also alleges that the length of time that he was improperly  
13 housed in the SHU violated his right to due process. *See, e.g., Wilkinson v. Austin*, 545 U.S. 209,  
14 223-25 (2005) (holding that indefinite placement in Ohio’s “supermax” facility imposes an  
15 “atypical and significant hardship within the correctional context.”) Further, Plaintiff alleges  
16 that he had filed staff complaints and inmate grievances, and Defendants retaliated against him  
17 for filing those complaints and grievances by housing him with a known enemy, confiscating and  
18 destroying his legal property, and continuing to house him in the SHU. Finally Plaintiff alleges  
19 that Defendants were deliberately indifferent to his safety by knowingly housing him with a  
20 known enemy. Liberally construed, Plaintiff states cognizable claims of due process violations,  
21 a right to be free from retaliation, and deliberate indifference to safety.

22 To the extent Plaintiff claims that Defendants are liable for destroying his property, that  
23 claim is dismissed. Ordinarily, due process of law requires notice and an opportunity for some  
24 kind of hearing prior to the deprivation of a significant property interest. *See Memphis Light,*  
25 *Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978). However, the intentional deprivation of  
26 property does not state a due process claim under § 1983 if the deprivation was random and  
27 unauthorized. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (intentional destruction of  
28 inmate's property). The availability of an adequate state post-deprivation remedy, e.g., a state

tort action, precludes relief because it provides sufficient procedural due process. *See Zinermon v. Burch*, 494 U.S. 113, 128 (1990).

In his second amended complaint, Plaintiff fails to link Defendants R. Davis, D. Foston, M. Hodges, N. Grannis, S.T. Smith, to a viable claim by failing to provide facts showing the basis for liability for each of these Defendants. As such, and because Plaintiff has already been given the opportunity to cure this deficiency, Defendants R. Davis, D. Foston, M. Hodges, N. Grannis, S.T. Smith are DISMISSED from this action.

### CONCLUSION

For the foregoing reasons, the Court hereby orders as follows:

1. Defendants R. Davis, D. Foston, M. Hodges, N. Grannis, S.T. Smith are DISMISSED.

2. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy of the second amended complaint and all attachments thereto (docket no. 14), and a copy of this Order to Defendants **CDW G. Lewis, C/O Dornan, Sgt. Moyers, Lt. A Oyarzabal, Lt. Atchely, Lt. J. Ippolito, CC2 V. Solis, CDW J. Negrete, Capt. M. Bryant, CC2 T. Miner, Sgt. P. Murphy, CSR J. Short, C/O Hollingworth, C/O Blakemanship, C/O Syner, C/O Citch, C/O K. Cannon, C/O B. Long, C/O J. Cable, and Sgt. Bonville at Salinas Valley State Prison.**

The Clerk of the Court shall also mail a courtesy copy of the second amended complaint and a copy of this Order to the California Attorney General's Office. Additionally, the Clerk shall mail a copy of this Order to Plaintiff.

3. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure requires them to cooperate in saving unnecessary costs of service of the summons and complaint. Pursuant to Rule 4, if Defendants, after being notified of this action and asked by the Court, on behalf of Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of such service unless good cause be shown for their failure to sign and return the waiver form. If service is waived, this action will proceed as if Defendants had been served on the date that the waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required

1 to serve and file an answer before **sixty (60) days** from the date on which the request for waiver  
 2 was sent. (This allows a longer time to respond than would be required if formal service of  
 3 summons is necessary.) Defendants are asked to read the statement set forth at the bottom of the  
 4 waiver form that more completely describes the duties of the parties with regard to waiver of  
 5 service of the summons. If service is waived after the date provided in the Notice but before  
 6 Defendants have been personally served, the Answer shall be due **sixty (60) days** from the date  
 7 on which the request for waiver was sent or **twenty (20) days** from the date the waiver form is  
 8 filed, whichever is later.

9 4. No later than **ninety (90) days** from the date of this order, Defendants shall file a  
 10 motion for summary judgment or other dispositive motion with respect to the cognizable claims  
 11 in the second amended complaint.

12 a. If Defendants elect to file a motion to dismiss on the grounds that Plaintiff  
 13 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),  
 14 Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*, 315  
 15 F.3d 1108, 1119-20 (9th Cir. 2003).

16 b. Any motion for summary judgment shall be supported by adequate factual  
 17 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil  
 18 Procedure. **Defendants are advised that summary judgment cannot be granted, nor**  
 19 **qualified immunity found, if material facts are in dispute. If Defendants are of the opinion**  
 20 **that this case cannot be resolved by summary judgment, they shall so inform the Court**  
 21 **prior to the date the summary judgment motion is due.**

22 5. Plaintiff's opposition to the dispositive motion shall be filed with the Court and  
 23 served on Defendants no later than **thirty (30) days** from the date Defendants' motion is filed.

24 a. In the event Defendants file an unenumerated motion to dismiss under  
 25 Rule 12(b), Plaintiff is hereby cautioned as follows:<sup>1</sup>

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26  
 27 <sup>1</sup> The following notice is adapted from the summary judgment notice to be given to pro se  
 28 prisoners as set forth in *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See  
*Wyatt v. Terhune*, 315 F.3d at 1120 n.14.

1 The defendants have made a motion to dismiss pursuant to Rule 12(b) of  
 2 the Federal Rules of Civil Procedure, on the ground you have not exhausted your  
 3 administrative remedies. The motion will, if granted, result in the dismissal of  
 4 your case. When a party you are suing makes a motion to dismiss for failure to  
 5 exhaust, and that motion is properly supported by declarations (or other sworn  
 6 testimony) and/or documents, you may not simply rely on what your complaint  
 7 says. Instead, you must set out specific facts in declarations, depositions, answers  
 8 to interrogatories, or documents, that contradict the facts shown in the defendant's  
 9 declarations and documents and show that you have in fact exhausted your  
 10 claims. If you do not submit your own evidence in opposition, the motion to  
 11 dismiss, if appropriate, may be granted and the case dismissed.

12 b. In the event Defendants file a motion for summary judgment, the  
 13 Ninth Circuit has held that the following notice should be given to plaintiffs:

14 The defendants have made a motion for summary judgment by which they  
 15 seek to have your case dismissed. A motion for summary judgment under Rule  
 16 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

17 Rule 56 tells you what you must do in order to oppose a motion for  
 18 summary judgment. Generally, summary judgment must be granted when there is  
 19 no genuine issue of material fact – that is, if there is no real dispute about any fact  
 20 that would affect the result of your case, the party who asked for summary  
 21 judgment is entitled to judgment as a matter of law, which will end your case.  
 22 When a party you are suing makes a motion for summary judgment that is  
 23 properly supported by declarations (or other sworn testimony), you cannot simply  
 24 rely on what your complaint says. Instead, you must set out specific facts in  
 25 declarations, depositions, answers to interrogatories, or authenticated documents,  
 26 as provided in Rule 56(e), that contradict the facts shown in the defendants'  
 27 declarations and documents and show that there is a genuine issue of material fact  
 28 for trial. If you do not submit your own evidence in opposition, summary  
 judgment, if appropriate, may be entered against you. If summary judgment is  
 granted in favor of defendants, your case will be dismissed and there will be no  
 trial.

19 *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read  
 20 Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317  
 21 (1986) (holding party opposing summary judgment must come forward with evidence showing  
 22 triable issues of material fact on every essential element of his claim).

23 6. Defendants shall file a reply brief no later than **fifteen (15) days** after Plaintiff's  
 24 opposition is filed.

25 7. The motion shall be deemed submitted as of the date the reply brief is due. No  
 26 hearing will be held on the motion unless the Court so orders at a later date.

27 8. All communications by the Plaintiff with the Court must be served on Defendants  
 28 or Defendants' counsel, by mailing a true copy of the document to Defendants or Defendants'

1 counsel.

2 9. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.  
3 No further Court order is required before the parties may conduct discovery.

4 10. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court  
5 and all parties informed of any change of address and must comply with the Court's orders in a  
6 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute  
7 pursuant to Federal Rule of Civil Procedure 41(b).

8 IT IS SO ORDERED.

9 DATED: 4/9/12

  
LUCY H. KOH  
United States District Judge